

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-210859

DATE: April 19, 1984

MATTER OF: Louis J. Derdevanis - Entitlement to
Merit Pay Increase

DIGEST:

An employee's position under the General Schedule was to be converted to Merit Pay in October 1981. However, in September 1981, his position was removed from those to be converted to Merit Pay. This occurred after the employee's rating period had concluded resulting in a rating of "highly successful" which would have qualified him for a merit pay increase. Since the employee's position was not converted to merit pay and he was not under merit pay when the merit pay increases were awarded in October 1981, the agency denied his merit pay increase. We hold that the employee is not entitled to the merit pay increase since his position was not converted to merit pay and he was not under the merit pay program when the increases were awarded as required by applicable regulations.

ISSUE

The issue in this decision is the entitlement of an employee to a merit pay increase to be awarded after his position was removed from those to be converted to merit pay. The employee had been rated for merit pay purposes for the entire applicable rating period of 11 months, but he was not under the merit pay program at the time the increases were awarded. For the following reasons, we hold that the employee is not entitled to the merit pay increase for the period in question.

BACKGROUND

This decision is in response to the appeal by Mr. Louis J. Derdevanis from our Claims Group settlement, Z-2846629, dated February 1, 1983, denying his claim for a merit pay increase.

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Mr. Derdevanis, an employee of the Defense Logistics Agency (DLA), filed an unfair labor practice charge on January 19, 1982, with the Federal Labor Relations Authority, Case No. 3-CA-20278. The Federal Labor Relations Authority, by letter dated April 14, 1982, declined jurisdiction in the matter and therefore refused to issue a complaint. Subsequently, Mr. Derdevanis filed this action with our Office based upon the following circumstances.

By letter dated September 30, 1980, the agency notified Mr. Derdevanis and other DLA employees that their positions would convert to the Merit Pay System in October 1981, pursuant to Chapter 54 of the Civil Service Reform Act, Public Law 95-454, October 13, 1978, 5 U.S.C. §§ 5401 et seq. The agency identified 550 employees out of a total GS-13, 14, or 15 population of 741 as qualifying under the definition of "supervisor" or "management official" found at 5 U.S.C. § 7103 for the merit pay system. The September 30 letter also notified Mr. Derdevanis that DLA employees to be covered by merit pay would begin their first performance rating period in October 1980.

Because of the significant impact of DLA's decision to include nearly 75 percent of its potential merit pay population under its merit pay program, the DLA headquarters bargaining unit, the American Federation of Government Employees (AFGE), and eight DLA employees filed an unfair labor practice charge with the Federal Labor Relations Authority on June 18, 1981. The AFGE charged that DLA exceeded its authority by unilaterally removing these employees from the bargaining unit.

Shortly thereafter, we issued our decision in Office of Personnel Management's Implementation of Merit Pay, B-203022, September 8, 1981, which required the Office of Personnel Management (OPM) to decrease its proposed merit pay calculations. The agency advises that as a result of our decision, the Director of DLA decided to retroactively limit the DLA merit pay coverage to "only those * * * who clearly met the supervisory definition." This resulted in a reduction of DLA employees covered under merit pay from 550 to 237. Among those removed from merit pay coverage by this action was Mr. Derdevanis. As a result of DLA's decision to reduce its merit pay coverage, the AFGE and the eight DLA employees agreed to withdraw their unfair labor practice charge against the agency. Mr. Derdevanis was notified of the Director's decision to reconvert his

position to the General Schedule by letter dated September 21, 1981.

Prior to the decision to remove his position from merit pay coverage, Mr. Derdevanis received a "highly successful" merit pay appraisal dated September 7, 1981. This rating would have warranted a merit pay increase of \$494.57 in October 1981, but DLA has denied this increase since Mr. Derdevanis' position was removed from merit pay coverage. No within-grade increase was due Mr. Derdevanis during the period here involved since he did not complete the required waiting time until after October 1981.

DISCUSSION

The Claims Group Settlement recognized that Mr. Derdevanis was covered by the DLA's merit pay plan from October 1980 to September 1981. However, it went on to interpret section 540.110 of title 5 of the Code of Federal Regulations (1981) as prohibiting merit pay determinations before October 1, 1981. The relevant portion of that section provides as follows:

"(a) Except as provided in paragraph (b) of this section, the Merit Pay System shall be effective on the first day of the first applicable pay period which begins on or after October 1, 1981.

"(b) An agency may implement the Merit Pay System for any group or category of supervisors or management officials in positions classified in GS-13, 14, or 15 on the first day of the first applicable pay period which begins on or after October 1, 1980, * * *.

"(c) Notwithstanding § 540.104(a) of this part, the first merit pay determination shall be made for each employee initially covered under the Merit Pay System on the date the Merit Pay System is effective for that employee under paragraph (a) or (b) of this section, or on the closest date after that date that is determined by the

agency to be administratively feasible but in no event more than 60 days after that date."

Additionally, section 540.104(a) of the Code of Federal Regulations provides as follows:

"(a) A merit pay determination is to be made for each employee covered by the Merit Pay System on October 1 of each year, or on the closest date before or after October 1 that is determined by the agency to be administratively feasible (but in no event more than 90 days before or 60 days after October 1)."

As indicated above, Mr. Derdevanis was officially notified by letter dated September 30, 1980, that he would begin his first merit pay performance rating period in October 1980, and that his position would convert to the merit pay system in October 1981, after the completion of the initial rating period. However, after the conclusion of the full 11-month rating period and the assignment and approval of ratings, but before the formal conversion to merit pay, DLA decided to reverse its conversion process with respect to Mr. Derdevanis' position. Mr. Derdevanis does not challenge DLA's authority to remove his position from merit pay coverage. What Mr. Derdevanis does challenge is DLA's position that its subsequent decision not to permanently convert his position to merit pay coverage negates any purported vested right that may otherwise have accrued from Mr. Derdevanis' "highly successful" rating for the entire rating period during which he and his agency considered him to be performing under its merit pay plan.

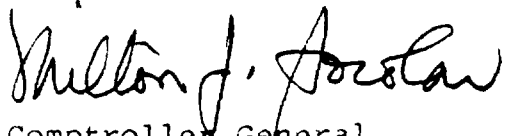
We conclude that the agency's denial of the merit pay increase is consistent with the language and intent of applicable regulations.

As indicated above, Mr. Derdevanis was not covered by DLA's Merit Pay System in October 1981, when his position would have been converted to the merit pay system and when the agency made its merit pay determinations. The implementing regulations issued by OPM imply that a merit pay determination may be made only for those employees covered by merit pay at the time the increase is to be awarded.

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See 5 C.F.R. § 540.104(a), quoted above. While an employee's performance appraisal may dictate the amount of the merit pay increase, it may not by itself mandate a merit pay increase if the employee has not been converted to and he is not under the merit pay program at the time of the effective date of the merit pay increase.

Accordingly, we conclude that the decision of DLA to withhold Mr. Derdevanis' merit pay increase is consistent with the language and intent of the implementing regulations issued by OPM. Therefore, we sustain our Claim Group's determination to deny Mr. Derdevanis' claim.

for 
Comptroller General
of the United States